

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CARL A. WESCOTT,

Plaintiff,

v.

JIM UPSHAW, et al.,

Defendants.

CASE NO. 3:20-CV-5442-BHS

ORDER DISMISSING PLAINTIFF'S
COMPLAINT WITHOUT PREJUDICE,
GRANTING PLAINTIFF LEAVE TO
AMEND, AND RENOTING
PLAINTIFF'S MOTION TO PROCEED
IN FORMA PAUPERIS

Plaintiff Carl A. Wescott, proceeding *pro se*, filed this action on May 5, 2011 alleging a breach of contract. *See* Dkt. 1-1. Plaintiff filed an Application to Proceed *In Forma Pauperis* ("IFP") on June 1, 2020. Dkt. 4. The District Court has referred Plaintiff's pending Application to Proceed IFP and Proposed Complaint to United States Magistrate Judge David W. Christel pursuant to Amended General Order 02-19.

Having reviewed and screened Plaintiff's Proposed Complaint under 28 U.S.C. § 1915(e)(2), the Court finds this Court lacks jurisdiction to hear this case. The Court dismisses

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1 Plaintiff's Proposed Complaint without prejudice, re-notes the pending Application to Proceed
 2 IFP, and provides Plaintiff leave to file an amended pleading by July 31, 2020, to cure the
 3 deficiencies identified herein.

4 **I. Background**

5 Plaintiff alleges Defendants Jim Upshaw, Upshaw Performance Systems, Inc., Chris
 6 Patterson, HPA Mortgage LLC, and Does 1 through 25 breached a development contract causing
 7 Plaintiff harm. Dkt. 1-1. Plaintiff alleges several other state law claims arising from Defendants'
 8 alleged conduct. *Id.*

9 **II. Discussion**

10 The district court may permit indigent litigants to proceed IFP upon completion of a
 11 proper affidavit of indigency. *See* 28 U.S.C. § 1915(a). However, the “privilege of pleading *in*
 12 *forma pauperis* . . . in civil actions for damages should be allowed only in exceptional
 13 circumstances.” *Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986). The Court has broad
 14 discretion in denying an application to proceed IFP. *Weller v. Dickson*, 314 F.2d 598 (9th Cir.
 15 1963), *cert. denied* 375 U.S. 845 (1963).

16 Notwithstanding IFP status, the Court must subject each civil action commenced pursuant
 17 to 28 U.S.C. § 1915(a) to mandatory screening and order the *sua sponte* dismissal of any case
 18 that is “frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks
 19 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B);
 20 *see also Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. §
 21 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir.
 22 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to *sua*
 23 *sponte* dismiss an IFP complaint that fails to state a claim).

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1 Unless it is clear a *pro se* plaintiff cannot cure the deficiencies of a complaint, the Court
 2 will provide the *pro se* plaintiff with an opportunity to amend the complaint to state a plausible
 3 claim. *See United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (“Dismissal
 4 without leave to amend is improper unless it is clear, upon de novo review, that the complaint
 5 could not be saved by any amendment.”).

6 Here, Plaintiff’s Proposed Complaint suffers from deficiencies requiring dismissal if not
 7 corrected in an amended complaint. In the Proposed Complaint, Plaintiff states this Court has
 8 jurisdiction over this case through diversity jurisdiction. Dkt. 1-1, p. 4. “The district courts shall
 9 have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or
 10 value of \$75,000, . . . and is between citizens of different states[.]” 28 U.S.C. § 1332(a). Diversity
 11 jurisdiction requires complete diversity of citizenship, *i.e.*, that every plaintiff be a citizen of a
 12 different state from every defendant. *Grancare, LLC v. Thrower ex rel. Mills*, 889 F.3d 543, 548
 13 (9th Cir. 2018) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996)).

14 Here, Plaintiff has failed to allege complete diversity. Plaintiff alleges he is a resident of
 15 California. Dkt. 1-1, p. 2. He alleges Defendants Upshaw and Patterson are residents of
 16 Washington State and he alleges Defendant Upshaw Performance Systems, Inc. is a corporation
 17 located in Washington State. *Id.* However, Plaintiff also states Defendant HPA Mortgage, LLC is
 18 a California LLC. *Id.* Plaintiff and Defendant HPA Mortgage, LLC are both citizens of
 19 California. As Plaintiff and one Defendant are citizens of the same state, there is not complete
 20 diversity and this Court lacks jurisdiction to hear this case.

21 The Court also notes it is unclear if venue is proper in the Western District of
 22 Washington. The Proposed Complaint fails to adequately show the claims in the Proposed
 23 Complaint are properly heard in the Western District of Washington beyond three Defendants

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1 being located in this district. If Plaintiff determines venue is not proper in the Western District of
2 Washington, he may voluntarily dismiss this case.

3 **III. Instructions to Plaintiff and the Clerk**

4 Due to the deficiencies described above, the Court finds it lacks jurisdiction to hear this
5 case. Therefore, the Court dismisses Plaintiff's Proposed Complaint without prejudice. If
6 Plaintiff intends to pursue this action, he must file an amended complaint on or before July 31,
7 2020. The amended complaint will act as a complete substitute for any previously filed
8 complaint, and not as a supplement. If Plaintiff fails to file an amended complaint or otherwise
9 respond, the undersigned will recommend that the Application to Proceed IFP be denied and that
10 the case be closed.

11 If Plaintiff submits an adequate complaint, the Court will consider the Application to
12 Proceed IFP. The Clerk is directed to re-note the Application to Proceed IFP (Dkt. 4) for
13 consideration on July 31, 2020.

14 Dated this 25th day of June, 2020.

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17 David W. Christel
18 United States Magistrate Judge
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